ILLINOIS POST-CONVICTION RELIEF— A COMPARATIVE ANALYSIS

I. INTRODUCTION

Recently the most significant development in Ohio criminal procedure has been the enactment of the Ohio Post-Conviction Remedy Act.[1] The purpose of this act is to provide a statutory proceeding by which a prisoner convicted under Ohio law could present to a court his claims that the proceeding leading to his conviction was constitutionally void or voidable. The method of presenting these claims under the statute was designed to be nontechnical, adequate, and independent of other post-conviction remedies available under Ohio law. The effect desired by the General Assembly in enacting the statute was to reduce the number of habeas corpus petitions filed in Ohio.[2] It was hoped that by shifting the burden of determining the merits of these constitutional claims to the original courts of conviction there would be a subsequent reduction in the use of habeas corpus. Because of an understandable lack of Ohio case law interpreting the statute, the result has been that many Ohio judges and attorneys must now conduct post-conviction proceedings with only minimal guidance from the statute itself.

It has been suggested that the Ohio bench and bar might find initial guidance in Illinois opinions and experiences dealing with its post-conviction statute. An appropriate presentation of the Illinois case law construing its post-conviction hearing statute[3] should be particularly useful in solving those problems raised by the Ohio statute that have not been resolved by the Ohio courts. However, it seems necessary that a discussion of the Illinois experience should be tailored in two particular respects. First, specific sections of the Illinois statute will be related to corresponding sections of the Ohio statute where the intent and meaning require such treatment. Also, only those Illinois decisions, procedures, and policies which have utility in the Ohio situation will be considered.

An immediate problem presented by the Ohio post-conviction statute is who may file a petition under the statute. The Ohio statute uses the introductory phrase: "a prisoner in custody under sentence";[4]

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[1] Ohio Rev. Code Ann. §§ 2953.21-.24 (Page Supp. 1965).

[2] See Freeman v. Maxwell, 4 Ohio St. 2d 4, 210 N.E.2d 885 (1965). The Ohio Supreme Court, per curiam, concluded that the availability of the post-conviction remedies in Ohio is a ground for the denial of the remedy of habeas corpus in pending as well as in future actions.

[3] Ill. Ann. Stat. ch. 38, § 122 (Smith-Hurd 1964).

[4] Ohio Rev. Code Ann. § 2953.21 (Page Supp. 1965).

this phrase, of course, is less restrictive than the Illinois phrase, "imprisoned in the penitentiary."[5] The Ohio statutory words, "custody" and "sentence," are easily applied in most cases, but they present difficulties in their application to the more unusual situations. In the ordinary situation "custody" stresses the *fact* of custody rather than the *place* of custody because no specific place is mentioned, as is found in the Illinois statute. Thus it follows that an Ohio prisoner is in custody whether he is incarcerated in the state penitentiary, the Lima Mental Hospital, or a state honor farm. But the fact of custody is less than precise when the petitioner, for example, is sentenced to serve ten consecutive weekends in the county jail. The question arises whether his remedy under the Ohio statute exists only while he is actually confined. If the response is in the affirmative, then the statute would require that the petitioner file his petition for relief on a weekend, and that the court should only hear his petition on the weekend. This restricted approach would produce an absurdity; common sense dictates that the fact of constructive custody should be sufficient under the statute.

The interpretation of the statutory word, "sentence," also presents difficulties. Admittedly in most instances the petitioner filing under the statute will be attacking the very conviction for which he is serving sentence. But in an occasional case, the petitioner will seek to set aside a conviction for which he is not presently serving. In that situation fairness and justice would dictate that he should be permitted to attack a conviction when he can establish a reasonable relationship between the conviction and the sentence which he is serving. This rule would permit a prisoner convicted of recidivism to attack the underlying conviction because he would be able to establish the relationship between the sentence which he is serving and the earlier conviction.[6] However, a more difficult problem is presented when the

[5] Ill. Ann. Stat. ch. 38, § 122-1 (Smith-Hurd 1964). Judicial interpretation of the statutory word "penitentiary" which is used in the statute has extended the scope of the Illinois act to include any person convicted of a serious crime and imprisoned at the time that they file a post-conviction petition. Thus, women in the reformatory and men on death row in the Cook County Jail could invoke the procedure because they were convicted of serious crimes. But those persons who have been finally released or who are on parole or who have been convicted of minor crimes are not within the scope of the Illinois statute because the word "penitentiary" has been construed to limit the scope of the remedy. See People v. Dale, 406 Ill. 238, 246-47, 92 N.E.2d 761, 766 (1950).

[6] See also People v. Franciere, 47 Ill. App. 2d 436, 198 N.E.2d 170 (1964), in which the court analyzed the relationship necessary between the sentence and the proceeding challenged in the post-conviction proceeding. In that case petitioner was placed on five years probation after pleading guilty to three indictments of auto theft. While on probation he was ordered to appear at a probation board hearing in order to show cause why his probation should not be revoked. The result of the hearing was that petitioner's

petitioner is serving consecutive prison sentences which do not have a corresponding relationship. For example, suppose that a petitioner has been sentenced in one trial to fifteen years in prison and in a second trial to ten years in prison. While serving the fifteen year sentence petitioner wants to attack the constitutionality of the second trial on the ground that his right to an impartial jury was violated. Should the petitioner be barred from attacking the second conviction for which he has not begun serving the sentence imposed? Here again policy would dictate that the statute would give the petitioner the right to attack the second conviction. He is "a prisoner in custody under sentence," and the only difficulty is that he is not serving the sentence imposed by the second conviction. Obvious unfairness would result if he had to wait until the first sentence ended before he could file his petition. At that time, the evidence would be stale and in many instances nonexistent.

"A prisoner in custody under sentence" seeking post-conviction relief must first file a verified petition in the court which imposed sentence.[7] At that point three general questions which demand specific application to the filed petition must be answered. These questions are as follows: Does the petition show entitlement to relief, what effect should be given the doctrines of waiver and res judicata, and what procedure should the Ohio court of conviction apply in disposing of the petition? It is in answering these general questions that the Illinois experience with its statute becomes helpful. A detailed consideration of each step taken under the Illinois statute can aid the parties in their preparation and the Ohio judge in the eventual disposition of a petition filed in his court.

Before considering in detail each step followed in the Illinois post-conviction remedy procedure, it is useful from an organizational

probation was revoked in each of the three cases, and that he was sentenced to the penitentiary for concurrent terms of two to six years. While serving his sentence in the penitentiary the petitioner filed a petition under the Illinois Post-Conviction Hearing Act in which he asked that the orders revoking his probation be set aside. The appellate court reversed the lower court decision and granted a rehearing for revocation of probation for lack of evidence but affirmed the dismissal of his post-conviction petition because it pertained exclusively to matters involved in the proceeding which resulted in the revocation of his probation.

But the situation in *Franciere* must be contrasted to the situation concerned in the conviction for recidivism. In the latter situation the earlier conviction which is being attacked in the post-conviction petition is the basis for the conviction and sentence for recidivism. Thus, if the earlier conviction were voidable, the result would be that the conviction for recidivism would be questionable because of the direct relationship. For the federal approach to "standing," see Comment, 27 Ohio St. L.J. 302, 312 (1966).

[7] Ohio Rev. Code Ann. § 2953.21 (Page Supp. 1965).

standpoint to take an overview of the remedy. The general principles to be employed by the trial court in adjudicating a petition under the Illinois statute were examined by the Illinois Supreme Court in *People v. Jennings*.[8] In that case the court set out the judicial steps which were to be taken under the statute by the lower courts in their disposition of a post-conviction petition. The principles involved present a basic outline of the remedy. The steps and their basic guiding principles, in summarized form, are as follows:

(1) The post-conviction court must find that the petition sufficiently invokes the remedy provided by the statute. A petition which is sufficient under the Illinois statute contains substantial allegations of denial of constitutional rights together with supporting affidavits.[9] A sufficient petition calls for an answer by the state's attorney and a hearing on the merits. An insufficient petition is subject to a motion to dismiss by the State's attorney.[10]

(2) The court must find that the claims in the petition have not been waived. If the court finds that there has been waiver of the particular claims, it should deny relief. In addition, the court must find that the claims have not been adjudicated against the petitioner in

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[8] 411 Ill. 21, 102 N.E.2d 824 (1952).

[9] Ill. Ann. Stat. ch. 38, § 122-1 (Smith-Hurd 1964). The Illinois statute requires that there be "a petition . . . verified by affidavit," and yet the Ohio statute requires only "a verified petition." Ohio Rev. Code Ann. § 2953.21 (Page Supp. 1965). In Illinois, if there is a lack of affidavits supporting the verification, the trial court may dismiss the petition if this lack is neither excused nor explained. While the Ohio statute does not require affidavits, dismissal of an unverified petition would appear to be proper. But in the rare case in which an Ohio prisoner would file an unverified petition, it would seem appropriate for the court to permit an amendment in order to conform the petition to the statutory requirements. The Illinois courts can allow the petitioner additional time to complete proper verification. People v. Jennings, *supra* note 8, at 26, 102 N.E.2d at 827.

[10] The Ohio approach to the question of a sufficient petition filed under the statute is governed by Ohio Rev. Code § 2953.21 (Page Supp. 1965), which states in part: "Unless the petition and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the prosecuting attorney. . . ." The Ohio statute requires that the post-conviction court initially examine the petition and its supporting material in order to determine if the petitioner has stated grounds in his petition, which if true, would be sufficient to invoke the statutory remedy. If the court finds that the petition filed is sufficient in that relief might be given, the prosecuting attorney must be notified. But if the court determines that the petition is insufficient, then it would be proper for the court to dismiss the petition on its own motion. The difference between the Ohio statute and the Illinois statute is that in Illinois the State's attorney must move to dismiss the petition, while in Ohio, the trial judge may dismiss the petition without relying on the prosecutor. The result is that in Illinois the state must act as soon as the petition is filed, and in Ohio the state must only act in the case of a sufficient petition.

another proceeding which was free from constitutional defect. In the absence of such a finding, res judicata bars relief to the petitioner under the statute.

(3) The court must find that the petitioner has proved the truth of the allegations contained in his petition.

If the post-conviction hearing court finds in favor of the petitioner, it is the duty of that court to set aside the judgment of conviction and to enter supplemental orders.[11] If the court however finds against the petitioner in any one of these three steps, it is the duty of the court to dismiss the petition.

II. Petitions Entitled to Relief

A petitioner, who files a petition which clearly alleges that in the proceedings which have resulted in his conviction there was a substantial denial of a constitutional right, has filed a petition which is entitled to relief if the allegations are true.[12] Post-conviction relief is the end result desired by each petitioner, but his success is dependent on how well he can establish that there has been a substantial denial of his constitutional rights. Indeed some petitions allege procedural errors, while others allege abridgments of substantive rights. Some petitions are dismissed on motion by the state, others are entitled to a hearing on the merits. Still others are dismissed after the hearing and some result in the setting aside of the conviction. This particular section of the comment considers what petitions are entitled to a hearing under the statute.

A. *Procedural Matters*

Most post-conviction petitions which allege only procedural errors will be dismissed by the hearing court on motion by the State's attorney. This is because the allegation does not usually disclose the denial of a constitutional right.[13] The Illinois Supreme Court in *People v. Hartman*[14] has supplemented this ruling with a policy reason:

> It certainly was not the intent of the General Assembly, by the new act in question, to enable a person convicted of a crime to have a review of ordinary questions of procedure, for which the law already provides a remedy, by charging that they constitute a denial of constitutional rights.[15]

The requirement is that a constitutional right when alleged in a

11 People v. Jennings, *supra* note 8, at 27, 102 N.E.2d at 827.

12 *Id.* at 26, 102 N.E.2d at 827.

13 People v. Farley, 408 Ill. 288, 294, 96 N.E.2d 453, 457 (1951).

14 408 Ill. 133, 96 N.E.2d 449 (1951).

15 *Id.* at 137, 96 N.E.2d at 451.

post-conviction petition must necessarily involve a constitutional question.[16] The mere assertion of a constitutional right is not sufficient. Thus the appellate cases which have considered the availability of the post-conviction remedy to resolve procedural errors have generally held that the errors did not present constitutional issues. For example, an allegation claiming that the indictment was insufficient was considered by the court to be without constitutional merit.[17] Again an allegation in a post-conviction petition claiming that the trial court improperly allowed a continuance to the state was held to have been dismissed properly.[18] Also trial errors by the presiding judge in ruling on evidence[19] and in giving an instruction to the jury[20] were not found to constitute allegations which would make a petition entitled to relief.

While the general rule is that a post-conviction petition which alleges procedural errors is properly dismissed without a hearing, there are two notable exceptions. The Illinois courts have held that a petition which alleges that the trial court lacked jurisdiction over the person of the petitioner is sufficient to invoke the post-conviction statute and requires an answer from the State's attorney.[21] The denial concerns a procedural matter, but since it brings into question the validity of the proceeding which resulted in the petitioner's imprisonment, it is within the scope of the remedy because it raises the constitutional right to due process.

Griffin v. Illinois[22] raised the other notable exception to the general rule when it ruled that the State of Illinois is required to provide a stenographer's transcript or "other means of affording adequate and effective appellate review. . . ."[23] Because that case raised the availability of a record of the trial proceedings to an indigent defendant

16 See People v. Farley, *supra* note 13.

17 People v. Adams, 4 Ill. 2d 453, 455, 123 N.E.2d 327, 328 (1954).

18 See People v. Farley, *supra* note 13. The court noted that if the trial court did commit error in allowing the continuance, that error could be easily reviewed by the ordinary processes afforded for the review of convictions in criminal cases.

19 People v. Kirkwood, 17 Ill. 2d 23, 25, 160 N.E.2d 766, 768 (1959).

20 People v. Joyce, 1 Ill. 2d 225, 229, 115 N.E.2d 262, 264 (1953).

21 People v. Manning, 412 Ill. 519, 522, 107 N.E.2d 856, 857 (1952). Petitioner had been found to be feeble-minded by an earlier court. He was then tried and convicted in a different court. In his post-conviction petition he alleged that because the earlier court still retained jurisdiction over him at the time of his conviction, the second court did not have jurisdiction over him when he was tried and convicted. The Illinois Supreme Court reversed the dismissal of the lower court because it held that the petition was sufficient to invoke the act.

22 351 U.S. 12 (1956).

23 *Id.* at 20.

to the level of a constitutional right, the Illinois courts have held that a petition alleging the denial of that right is sufficient to invoke the remedy.[24] In comparing the general rule concerning procedural errors to its exceptions, the result is that the court has adhered to its original requirement that the post-conviction petition must allege a denial of a constitutional right and that only those procedural errors which violate constitutional rights can properly be a basis for relief under the statute.

B. *Substantive Rights*

It is the abridgement of substantive rights which forms the basis of most allegations found in post-conviction petitions; the typical petition alleges that the proceeding which resulted in the conviction of the petitioner resulted in a denial or abridgement of his constitutional rights. Such a petition is the focal point of the remedy provided by the post-conviction statute:

> The history of our Post-Conviction Hearing Act and the construction placed upon it by this court establish that it provides, and was meant to provide, an original and independent remedy by a proceeding, civil in nature, to investigate into the existence of a *substantial denial of the constitutional rights* of a prisoner in the proceeding which resulted in his conviction.[25]

This statement clearly presents the principle aim of the Illinois statute and the Ohio statute as well. Yet the aim gives little guidance to the trial judge as to how to proceed with the emphasized words, "substantial denial of the constitutional rights. . . ." It is therefore necessary to suggest an approach which can be used by Ohio judges in adjudicating any petition filed under the Ohio statute. The approach would be to adopt a procedural technique which could be relied on in each case to dispose properly of the post-conviction petition which has been filed. This technique combines an analysis of the pivotal statutory

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[24] People v. Bragg, 16 Ill. 2d 336, 157 N.E.2d 57 (1959). In this case the notes which were available to produce a transcript were made in the Munson system of shorthand. At the time that petitioner wanted a transcript of his trial for post-conviction remedy purposes, the Munson system had been in disuse for thirty years. The result was that the production of the transcript would require some two hundred hours of work. The Illinois Supreme Court ordered that a serious effort should be made to obtain a transcript, and that the responsibility rested with the state. Compare Norvell v. Illinois, 373 U.S. 420 (1963); United States v. Pate, 318 F.2d 559 (7th Cir. 1963), in which the court held that when the transcripts are no longer available and the State of Illinois is not hostile or invidious, the fourteenth amendment does not require performance of the impossible; for example, the production of a transcript when the reporter is dead or the notes have been lost.

[25] People v. Wakat, 415 Ill. 610, 615, 114 N.E.2d 706, 709 (1953). (Emphasis added.)

words with those decided cases which are dispositive of the issues of law and fact raised by the post-conviction petition. Thus the principle aim of the statute is carried out by examining the statutory words in light of the federal and state cases which have decided like issues in other remedies.

The technique when applied in Illinois is dependent on an analysis of the phrase, "substantial denial of constitutional rights." A finding by the court that this has occurred is the triggering event in setting aside the petitioner's conviction.[26] For purposes of analysis in using the technique, the phrase may be considered as being composed of three necessary elements: substantial, denial, and constitutional right. In using these three elements as a basis for an approach to the disposition of the petition, it is better if they were considered in reverse order, *i.e.*, a constitutional right denied substantially.

The first determination which must be made by the post-conviction judge is that the petition clearly concerns an existing constitutional right.[27] The petition must clearly identify which constitutional right the petitioner is relying on in order to invoke the remedy of the statute.[28] The right alleged must be one which is guaranteed either by the Constitution of the United States or of the State. In making this initial determination relevant federal and state judicial opinions can be examined to see if the petitioner did have the constitutional right which he now claims.

Once the court finds that the petition clearly alleges a right which is protected constitutionally, the trial judge must next determine if the right has in fact been denied.[29] Once again the petition must state

[26] Ill. Ann. Stat. ch. 38, § 122-1 (Smith-Hurd 1964) provides: "Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article." The Ohio act, Ohio Rev. Code Ann. § 2953.21 (Page Supp. 1965), uses the words: "such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States. . . ." In applying the technique in Ohio, these statutory words would be the basis of the approach.

[27] The Illinois statute uses the words, "his rights under the Constitution of the United States or of the State of Illinois. . . ." Ill. Ann. Stat. ch. 38, § 122-1 (Smith-Hurd 1964); the Ohio statute uses the words, "The rights of the prisoner as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States. . . ." These phrases seem to express the same legislative intent although the statutes are in different jurisdictions and the wording is not the same. Both require in their ultimate effect that the petition be based on a constitutional right.

[28] People v. Hartman, *supra* note 14, at 138, 96 N.E.2d at 451.

[29] Ill. Ann. Stat. ch. 38, § 122-1 (Smith-Hurd 1964) requires a "denial," but Ohio Rev. Code Ann. § 2953.21 (Page Supp. 1965) requires either a "denial or infringement."

clearly in what respect the denial of the right has occurred. To complete the determination of denial there must also be a finding that the ultimate fact of denial has occurred *in the proceeding* which resulted in the petitioner's conviction.[30] It is instructive to note in this connection that the Ohio statute uses the words "denial and infringement" while the Illinois statute specifies only a denial. The Ohio statute seems to require that the courts permit relief where the actions complained of do not amount to a denial, but yet are of such an effect as to deprive the petitioner of the constitutional rights guaranteed to him.

Having found that there has been a denial of a constitutional right, the judge must then determine if the denial was substantial. While the word "substantial" is used in Illinois, in Ohio the trial judge must determine if the denial was "such a denial" as to be "void or voidable" constitutionally.[31] Both the Illinois and the Ohio standards are, it is asserted, expressive of the concept of prejudice. Each statute in using these words seeks to make certain that relief will only be af-

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[30] See generally People v. Heirens, 4 Ill. 2d 131, 122 N.E.2d 231 (1954). In this case the petitioner Heirens was arrested and taken to a hospital at which sodium pentothal was injected into him. Under the drug's influence he related the details of the murders and robberies which he had committed. The police further administered a lie-detector test without his permission. Later they searched his living quarters illegally. In his post-conviction petition he alleged that these illegal acts and coercive conduct by the police caused him to plead guilty at trial. The court held that the petition was properly dismissed. The court advanced the following reasoning to support its decision:

> If either a confession or a plea of guilty is caused by illegal and coercive conduct on the part of law-enforcement officials, the conviction cannot stand .... But the issue here is whether the pleas are attributable to the conduct in question. If it is reasonably found that there is no relationship of cause and effect, the fact that illegal acts were committed in order to extract information or confessions from the accused does not warrant setting aside the conviction. In the case at bar the finding that the pleas were not the product of any illegal conduct of law-enforcement officials is amply supported by the evidence. The pleas of guilty were not made until more than a month after the occurrence of the acts complained of; and petitioner must be deemed to be aware, through his counsel, that any evidence obtained by unlawful methods could not have been used against him. It is clear that the antecedent conduct of police and State's Attorney, however much it is to be condemned, had no substantial connection with the pleas of guilty.

People v. Heirens, *supra* at 141-42, 122 N.E.2d at 237. (Citations omitted.)

The above reasoning is more convincing in its attempt to demonstrate that there must be a substantial connection between the denial and the proceeding in which the petitioner was convicted than in the application of the requirement.

[31] Ohio Rev. Code Ann. § 2953.21 (Page Supp. 1965) employs the phrase, "such a denial" which is enhanced by the phrase, "void or voidable." Both taken together would be comparable to the Illinois term, "substantial."

forded when the petitioner has been prejudiced by the denial of his constitutional rights. The determination of prejudice or substantiality can only be made after a hearing by the court on the merits of the petition. During the hearing, evidence should be presented both to support a finding that there was a denial, which is required by the statute, and to establish that the denial was prejudicial.

While the previous discussion introduces a procedural technique which may be used in the ultimate disposition of a post-conviction petition, its use in analyzing these petitions is not singular. Because many of the considerations which must be made in considering the petition on its merits must also be made in ruling on a motion to dismiss, this approach has concurrent application in considering the initial motion to dismiss the petition.[32] If, for instance, the petition does not allege a constitutional right, because either the right is not guaranteed by a constitutional provision or the right is not clearly set forth in the petition, it would be proper for the hearing court to dismiss the petition. The propriety of dismissal under these circumstances is based on the assumption that a hearing on the issues of denial and substantiality would be a wasted exercise if in the final analysis no right existed which could be substantially denied. Again a petition which sets forth no denial of a constitutional right should similarly be dismissed. Yet some petitions set forth a denial in the vaguest of language which might be made clearer if a hearing on the merits were held. Clearly, dismissal in such a situation would not serve the objectives of the statute. To resolve the problems involved in these vaguely stated petitions, the Illinois courts have adopted the following test to guide them in their decision: a petition should not be dismissed on motion wherein the alleged facts liberally construed in favor of the petitioner and assumed to be true show that there has been a denial of petitioner's constitutional rights.[33] Yet, it is important to note that this rule will save vaguely alleged denials from a motion to dismiss, but it will not be of assistance to a petitioner who does not clearly identify

[32] In Illinois, the State's attorney must move to dismiss the petition on the ground that it is insufficient to invoke the remedy provided by the statute. This motion is made either because the petition is believed to be insufficient or because the State's attorney needs more time in which to answer a sufficient petition. In either case the trial court must make a preliminary determination as to the sufficiency of the petition only when so moved by the State's attorney.

In Ohio the trial court must determine the question of the petition's sufficiency before it may ask the prosecuting attorney to answer. The result under either statute is that the trial court will determine if the petition is sufficient to invoke the remedy provided by the statute. See discussion in note 10 *supra*.

[33] People v. Jennings, *supra* note 8, at 26, 102 N.E.2d at 827.

the constitutional right on which he depends. Lastly where the post-conviction petition does not state the fact of substantiality clearly, the motion to dismiss should be overruled in order to permit the petitioner to offer evidence on the issue.

The actual application of this approach for the adjudication of post-conviction petitions and ruling on motions to dismiss might be presented in a discussion of how the Illinois courts have disposed of different petitions. By examining the results of the Illinois courts, the Ohio courts will be better able to judge which Ohio petitions are entitled to relief. The cases involving incompetency of counsel and coerced confessions require separate treatment because of their frequent appearance and because they present a more complete experience with certain substantive rights. Yet other rights which occasionally form the basis of post-conviction petitions are worthy of note in order to indicate the scope of the remedy provided by the statute.

1. Incompetency of Counsel

Post-conviction petitions which have been filed under the Illinois statute are often based on the allegation that petitioner's counsel was incompetent. Petitions alleging lack of counsel are infrequent because the Illinois Constitution guarantees the criminal defendant assistance of counsel[34] and the statutes provide for appointed counsel in those instances in which the defendant is unable to afford counsel.[35] Thus the focus of appellate concern in Illinois has been the question of incompetency of counsel, and in response the Illinois Supreme Court has attempted to guide the lower courts in their disposition of these particular post-conviction petitions.

A petition alleging inadequacy of counsel is based on a constitutional right, the right to have effective assistance of counsel. With the petition based on a constitutional right there must have been a substantial denial of that right in order for the petitioner to be entitled to relief. The determination of substantial denial is qualitative and not

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[34] Ill. Const. art. II, § 9 (1870).

[35] Ill. Ann. Stat. ch. 110, § 101.26(2) (Smith-Hurd 1956), which pre-dates the post-conviction statute, provides:

> In all criminal cases wherein the accused upon conviction shall, or may, be punished by imprisonment in the penitentiary, if, at the time of his arraignment he is not represented by counsel, the court shall before receiving, entering or allowing the change of any plea to an indictment or to an information if indictment has been waived, advise him he has a right to be defended by counsel. If he desires counsel, and states under oath he is unable to employ counsel, the court shall appoint competent counsel to represent him.

The same guarantees are present in Ohio, but allegations of lack of counsel are common. Ohio Const. art. I, § 10; Ohio Rev. Code Ann. § 2941.50 (Page 1953).

quantitative because the petitioner, by alleging incompetency of counsel, admits the existence of counsel. The qualitative aspect of the determination is resolved by deciding whether or not the petitioner's right to due process was prejudiced by the incompetency of his counsel. It is a question of whether the counsel which was chosen by petitioner or appointed for him was so incompetent so as to prejudice the petitioner in his right to have effective assistance of counsel.

The Illinois courts have attempted to dispose of these particular cases by presuming that petitioner's counsel was competent. This rebuttable presumption of competency has been relied on more strongly in the cases in which counsel was chosen than in the appointed counsel cases. The reason for this varying degree of reliance between chosen and appointed counsel cases is found in the underlying reasons and policies supporting it. While much of its support is found in bits and pieces throughout the opinions dealing with competency of counsel, a complete statement of the presumption is presented in the early case of *People v. Reeves*,[36] in which the court adopted the statement of Justice Minton:[37]

> Whenever the court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent a defendant, the presumption is that such counsel is competent. Otherwise, he would not be in good standing at the bar and accepted by the court. The constitutional requirements have been met as to the necessity for counsel. If the action of counsel in the presence of the court in the conduct of the trial reduces the trial to a travesty on justice, such conduct might be considered on the proposition that such a trial was a denial of due process. . . . Petitions challenging the competency of counsel, especially years after the conviction, must clearly allege such a factual situation which if established by competent evidence would show the representation of counsel was such as to reduce the trial to a farce or a sham. Otherwise they should be dismissed.[38]

In the case in which the petitioner has alleged that the counsel which he chose was incompetent, the courts have relied on the foregoing to dismiss the petition. The reason is that the Illinois Supreme Court has held, based on this presumption, that petitions alleging incompetency of *chosen* counsel do not set forth the required denial of a

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[36] 412 Ill. 555, 562-63, 107 N.E.2d 861, 865 (1952).

[37] In the case of United States v. Ragen, 166 F.2d 976 (7th Cir. 1948), the court of appeals reversed the district court's order to discharge the petitioner, Feeley. He had been discharged on the ground that his appointed counsel was not competent. Mr. Justice Minton stated the presumption of competency as the court's underlying reason supporting his reversal.

[38] *Id.* at 978-81.

constitutional right.[39] Thus it is proper for the trial court to dismiss the petition on motion without affording petitioner a hearing on the merits. The reason is that the petitioner has not alleged a denial, and as noted above, a petition which does not allege a denial is susceptible to a motion to dismiss. Yet a further practical reason prompts the summary treatment of these petitions and the unbending reliance on the presumption of competency:

> Ordinarily, a defendant who retains counsel of his own selection is responsible if that counsel does not faithfully serve his interest. Any other rule would put a premium upon pretended incompetence of counsel; for, if the rule were otherwise, a lawyer with a desperate case would have only to neglect it in order to insure reversal or vacation of the conviction.[40]

The allegation of incompetency of *appointed* counsel is treated entirely differently from the automatic treatment accorded petitions involving chosen counsel. Petitions alleging lack of counsel[41] or incompetency of appointed counsel require a full hearing on the merits by the trial court.[42] The hearing is required in order to permit the petitioner to present evidence that he has been substantially prejudiced by the incompetency of his attorney. Here the sustaining of a motion to dismiss would be improper, and the rebuttable quality of the presumption of competency comes into full force in order to allow the petitioner an opportunity to demonstrate to the hearing court that there was an inadequacy of representation which reduced the trial as

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[39] People v. Nischt, 23 Ill. 2d 284, 288, 178 N.E.2d 378, 381 (1961); People v. Kirkwood, *supra* note 19; Davies v. People, 10 Ill. 2d 11, 15, 139 N.E.2d 216, 218 (1956); People v. Heirens, *supra* note 30, at 143, 122 N.E.2d at 238; People v. Vitale, 3 Ill. 2d 99, 105, 119 N.E.2d 784, 787 (1954); People v. Mitchell, 411 Ill. 407, 104 N.E.2d 285 (1952).

[40] People v. Mitchell, *supra* note 39, at 407-08, 104 N.E.2d at 285.

[41] In People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957), the post-conviction petition alleged lack of counsel. Petitioner, who was fourteen at the time of his trial for murder, was defended quite well by one Simmons. Simmons, who had solicited petitioner's mother for the opportunity to defend her son, was not a licensed attorney. The trial court dismissed the petition, but on appeal it was reversed. The court reaffirmed its holding on the presumption of competency, but reasoned that it was not fundamentally fair that the petitioner should be defended by one whose right and qualifications are clouded with doubt. Compare People v. Evans, 4 Ill. 2d 211, 122 N.E.2d 730 (1954), in which the court reversed the lower court's dismissal of the post-conviction petition in which it was alleged that the petitioner did not have assistance of counsel and was not permitted to consult with counsel or his family before the trial.

[42] People v. Thomas, 20 Ill. 2d 603, 170 N.E.2d 543 (1960); People v. Hall, 413 Ill. 615, 110 N.E.2d 249 (1953). In each case the post-conviction petition alleged that appointed counsel was incompetent, but each petitioner failed to sustain the burden of proving that counsel was incompetent.

conducted to a sham and farce.[43] Both the court and Mr. Justice Minton would require the petitioner to meet the sham and farce test in order to rebut the presumption of competency. Yet the sham and farce standard is shrouded in a most inappropriate choice of words as they imply theatrical insinuations and intentional debauchery. Rather a more objective and logical test is preferred:

> However, based both on precedent and reason, we believe that in order to sustain his position here [that his appointed counsel was incompetent] the defendant must clearly establish: (1) actual incompetency of counsel, as reflected by the manner of carrying out his duties as a trial attorney; and (2) substantial prejudice resulting therefrom, without which the outcome would probably have been different. Due to the nature of the inquiry it is hardly possible to be more definite, and each case will have to be judged on its own particular facts as they appear in the context of the proceeding under consideration.[44]

2. Coerced Confessions

Petitions, which allege the introduction into evidence of a coerced confession in the proceeding which resulted in the petitioner's conviction, present another illustration of how the Illinois courts determine if a petition is entitled to relief. Because such a petition alleges the denial of a constitutional right, the trial court may not sustain a motion to dismiss the petition but must afford the petitioner a full hearing on the merits.[45] The underlying principle for the requirement of a full hearing is that:

> A voluntary confession by a competent person of the guilt of a crime is the highest type of evidence—an involuntary confession obtained

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[43] See People v. Morris, 3 Ill. 2d 437, 121 N.E.2d 810 (1954); People v. Reeves, *supra* note 36, at 563-64, 107 N.E.2d at 865-66. In People v. Morris, *supra*, the court held that the attorney's conduct did not measure up to that expected of a competent and conscientious trial attorney. The attorney, who was a Cook County public defender, was meager in preparation and scant in attention to the defense. The court ordered a new trial for the petitioner.

[44] People v. Morris, *supra* note 43, at 449, 121 N.E.2d at 817.

[45] People v. Walden, 19 Ill. 2d 602, 603, 169 N.E.2d 241 (1960); People v. La Frana, 4 Ill. 2d 261, 262, 122 N.E.2d 583, 584 (1954). In the case of People v. La Frana, *supra*, the petitioner alleged in his post-conviction petition that his confession to murder and to two robberies had been coerced. The trial court dismissed the petition on motion of the State's attorney. The Illinois Supreme Court denied petitioner's petition for a writ of error. But the United States Supreme Court vacated the judgments and remanded the case to the Illinois Supreme Court for further proceedings. Jennings v. Illinois, 342 U.S. 104, 111 (1951). The Illinois Supreme Court then remanded the petitioner's cause to the trial court for a hearing on the merits, People v. Jennings, *supra* note 8, at 27, 102 N.E.2d at 828.

> by brutality or coercion is wholly unreliable and is the most flagrant violation of the principles of freedom and justice.[46]

While the court is insistent that each petition alleging the use of a coerced confession as evidence must be given a hearing, the success of petitioners at the hearing has not been encouraging. Perhaps the recent case of *Escobedo v. Illinois*[47] will change the grimness of this picture in Illinois. The problem has resulted from the difficulty in finding that there was in fact a coerced confession. The petitioner's testimony usually concerns the brutality used in extracting the confession; this testimony is generally contradicted by the officers involved who deny everything. Petitioner's assertions without supporting evidence have meant failure in sustaining his claim, and the lower court's finding has been affirmed as a matter of course on appeal.[48] But the fact of coerced confession has been held to be established when the petitioner presents evidence which tends to support his allegation of coercion and the State's attorney does not present sufficient rebuttal evidence.[49]

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[46] People v. Hall, *supra* note 42, at 624, 110 N.E.2d at 254.

[47] 378 U.S. 478 (1964). But the Illinois Supreme Court has construed the holding of the case as limited in its effect to the facts of the case. See People v. Kees, 32 Ill. 2d 299, 205 N.E.2d 729 (1965); People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33 (1964). The court has rejected the wider rule that a confession may not be received in evidence if made by an accused without counsel or unless the right to counsel has been intelligently waived. People v. Kees, *supra*; People v. Hartgraves, *supra*. For a discussion of the *Escobedo* case, see Herman, "The Supreme Court and Restrictions on Police Interrogations," 25 Ohio St. L.J. 449, 471-81 (1964).

[48] See, *e.g.*, People v. Nischt, *supra* note 39; People v. Walden, *supra* note 45; Jackson v. People, 16 Ill. 2d 526, 158 N.E.2d 589 (1959); Davies v. People, *supra* note 39; Reck v. People, 7 Ill. 2d 261, 130 N.E.2d 200 (1955). The court's usual reasoning, which is applied in affirming the determination of the lower court, is as follows: "The defendant was ably represented both at his trial and upon the post-conviction hearing. We have carefully examined all of the testimony and we find no reason to set aside the determinations of those who saw the witnesses and heard them testify." People v. Walden, *supra* at 608, 169 N.E.2d at 244.

[49] People v. La Frana, *supra* note 45. In the hearing by the post-conviction court, petitioner presented evidence that his wife and attorney saw him shortly after he signed the confession. They testified that La Frana's face was swollen. The police stated that La Frana had fallen down the stairs in an attempt to escape. While many reporters were at the foot of the stairs, the newspapers carried no reports about the attempted escape. The post-conviction court dismissed the petition, but the Illinois Supreme Court reversed on the grounds that the State's attorney did not meet the burden placed on him by the petitioner's evidence. Petitioner for example testified that he was illegally detained by the police for a week after the confession was signed in order to afford an opportunity for the wounds to heal.

While La Frana's conviction was reversed, his codefendant, Davies, did not succeed with his post-conviction petition. Davies v. People, *supra* note 39. Even though La Frana testified that he saw the petitioner, Davies, struck by police officers, the post-conviction court found that the confession was not coerced, and the Illinois Supreme Court affirmed.

From the foregoing it can be seen that the suggested technique, when used with case law relevant to the issues, presents a clearer approach to the disposition of post-conviction petitions. Where a constitutional right was not involved, as in the allegation of a procedural error, the court was not required to continue its fact finding process and allowed a dismissal. Again where a constitutional right was alleged but a denial was not shown, as in the case of incompetency of chosen counsel, the court made no further determinations and simply dismissed on motion. Lastly, where a denial of constitutional right was alleged, as in the cases of incompetency of appointed counsel and coerced confessions, the court was not permitted to dismiss on motion, but was required to determine the issues during a hearing on the merits. This same approach is applicable to the disposition of petitions which allege denial of other constitutional rights.

3. Additional Constitutional Rights

While the usual allegations found in Illinois post-conviction petitions concern either incompetency of counsel or the use of a coerced confession, there are other constitutional rights which, once the denial is established, are sufficient to authorize remedial action under the Illinois statute. For example, allegations in a post-conviction petition asserting illegal arrest[50] or the use of evidence obtained through an illegal search and seizure should be sufficient to entitle the petition to relief. However, few Illinois cases report the use of these fourth amendment rights as a basis for post-conviction relief. Again several petitions contain allegations stating that petitioner was denied the constitutional right to a speedy trial,[51] but the Illinois Supreme Court has held that that right is violated only when the delay is arbitrary and oppressive.[52] This requirement insures that the delay complained

[50] See Miller v. People, 23 Ill. 2d 420, 424, 178 N.E.2d 355, 357-58 (1961), *cert. denied*, 369 U.S. 826 (1962), in which the petitioner alleged in his post-conviction petition that the purported warrant for his arrest was illegal because a deputy sheriff, who had just resigned as a justice of the peace, signed the warrant without authority. Petitioner alleged that the illegality of the warrant rendered his voluntary confession illegal. The court held that the allegation was insufficient to afford a basis for any relief since an arrest without a warrant would have been legal as there was sufficient probable cause.

[51] Ill. Const. art. 2, § 9 (1870). See also Ill. Ann. Stat. ch. 38, § 103-5(a) (Smith-Hurd 1964) which provides: "Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody . . . ."

[52] See People v. Farley, *supra* note 13, at 293, 96 N.E.2d at 456; People v. Hartman, *supra* note 14, at 136-37, 96 N.E.2d at 451. In each case the fact that the petitioner asked for and obtained a continuance beyond the 120 day period was controlling. See also People v. Allen, 15 Ill. 2d 455, 457, 155 N.E.2d 561, 562 (1959) (delay occasioned by conviction for malicious mischief as a prisoner); People v. Morris, *supra* note 43, at 442-43, 121 N.E.2d at 814.

of is truly prejudicial to the petitioner's right of due process. When sufficiently alleged, however, so as to survive a motion to dismiss, the petition is usually subject to eventual dismissal because of the doctrine of waiver.[53]

In several petitions it has been alleged that the prosecutor through his actions has deprived the petitioner of due process in the conduct of the trial. For instance, one post-conviction trial court set aside the conviction of the petitioner who claimed that his plea of guilty was induced by the prosecutor's promise to recommend leniency; the conviction was set aside because the promise was not executed even though it would not have been binding on the court in rendering its judgment and sentence.[54] Again the dicta in several opinions indicate that a petition alleging that the prosecutor suppressed evidence is sufficient to invoke the statute; but in each of the reported cases the court held that the facts failed to support a finding that there was a suppression.[55] The right to be tried by an impartial jury is another constitutional right,[56] which if the deprivation of it is proved, the post-conviction court must set aside the conviction. The Illinois Supreme Court has ruled that a jury is not impartial after its members have read incurably inflammatory newspaper reports[57] or have just served in another case which was similar to the one in question.[58] Lastly the prosecutor's knowing use of false testimony is sufficient to invoke the remedial qualities of the statute.[59]

The constitutional rights just discussed are those which have been reported to have been a basis for a petition seeking relief under the statute. Undoubtedly many more well-recognized constitutional rights

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[53] See text accompanying note 62 *infra*. See also the discussion of waiver and the right to a speedy trial in People v. Morris, *supra* note 43, at 442-43, 121 N.E.2d at 814.

[54] McKeag v. People, 7 Ill. 2d 586, 588, 131 N.E.2d 517, 518 (1956).

[55] People v. Turner, 29 Ill. 2d 379, 382-83, 194 N.E.2d 349, 351 (1963); People v. Nischt, *supra* note 39, at 292-93, 178 N.E.2d at 383 (petitioner's attorney was informed but not petitioner); Merkie v. People, 15 Ill. 2d 539, 545, 155 N.E.2d 581, 584 (1959).

[56] Ill. Const. art. 2, § 9 (1870).

[57] People v. Hryciuk, 5 Ill. 2d 176, 184-86, 125 N.E.2d 61, 66 (1955). The petitioner was granted a new trial because the jurors had read in the paper the night before they were to render a verdict that the petitioner had confessed to two murders, boasted that he had criminally attacked more than fifty women, and that he was described by the police as a "vicious degenerate." Compare Ciucci v. People, 21 Ill. 2d 81, 171 N.E.2d 34 (1961) (petitioner held to have waived the issue).

[58] People v. Adams, *supra* note 17.

[59] Napue v. People, 13 Ill. 2d 566, 569, 150 N.E.2d 613, 615 (1958). While the court stated that the ground was sufficient, it upheld the lower court's finding against the petition because the jury was sufficiently appraised of the witness' interest in testifying falsely. In this case the dissent presents a better appreciation of the petitioner's allegation.

have been employed as a basis, but the petitions in which they were raised were successfully disposed of at the trial level. The exhaustion of the reported cases necessarily ends the assistance which Ohio judges and lawyers can attain from the Illinois experience. Further and more basic assistance is found in those federal and Ohio cases which have discussed constitutional rights in order to determine which rights, if deprived, would render void or voidable the petitioner's conviction.

III. Waiver and Res Judicata

Once the post-conviction court has determined that the petitioner may be entitled to relief, the next step is to decide if the issues raised in the petition are barred by the application of either waiver or res judicata.[60] This step precedes a hearing on the merits only when the State's attorney's answer asserts that the issues have been waived or have been previously adjudicated. The reason is that both waiver and res judicata are affirmative defenses. When either defense is raised by the answer, its merit is properly determined during a post-conviction hearing;[61] the petitioner must have an opportunity to respond to the State's assertion that he is barred from raising his issues under the statute.

A. *Waiver*

An alleged denial of constitutional rights may be found by the post-conviction hearing court to have been waived by the petitioner if he has had a fair opportunity to assert these claims in a previous proceeding but has forfeited these claims by his failure to make a timely assertion.[62] Yet, because "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege,"[63] the courts have not found waiver where the petitioner was prevented from asserting his constitutional rights because of either inculpable ignorance or other extrinsic factors. Within this legal framework the Illinois decisions

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60 See People v. Jennings, 411 Ill. 21, 27, 102 N.E.2d 824, 827 (1952).

61 After the post-conviction court overrules the State attorney's motion to dismiss, the State's attorney must then answer the petition. In the answer it is appropriate to allege that the issues in the petition are barred by the doctrines of waiver or res judicata if those defenses are indicated by the facts. When either of these defenses is raised by the answer, the trial judge must determine at the commencement of the post-conviction hearing if the defense bars a further hearing on the issues. If either doctrine is properly raised and is applicable, then the court will proceed no further and dismiss the petition. If not barred, the court will rule against the defenses and then proceed to hear the merits of petitioner's allegations.

62 People v. Jennings, *supra* note 60, at 25, 102 N.E.2d at 826.

63 Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

dealing with waiver have indicated that there are three factual situations in which the post-conviction issues have been found to have been waived.

The trial court is the earliest situation in which the petitioner can effectively waive his claims of a denial of constitutional rights through his failure to assert them. But in order for the post-conviction court to find effective waiver at the trial level, the State's attorney must establish that the petitioner was represented by either counsel of his own choosing or by competent court appointed counsel, and also that there was sufficient opportunity to assert the denial of constitutional rights during the proceeding.[64] For example, where petitioner, who was represented by counsel, was acquitted by the jury under the first indictment and then later found guilty by the same jury under a similar and subsequent indictment, failure of the petitioner or his counsel to raise the objection that the same jury is sitting on the second indictment would waive the error. It is the affirmative duty of counsel to place the claims before the original court, or they are waived and are not justiciable before the post-conviction court.[65]

Another situation of waiver arises where the petitioner has prosecuted an appeal from the trial court's judgment of conviction through means of a writ of error with an attached bill of exceptions. In this situation constitutional issues not raised on appeal are waived and, subsequently, are not justiciable under the post-conviction statute.[66] Some hearing courts have confused the reasons for not deciding the issues raised under the statute in this situation. In some cases petitions, alleging issues which have been waived, have been dismissed on the ground of res judicata when the reason should have properly been waiver. But the Illinois Supreme Court has held that the reason advanced in this situation is of no import so long as the dismissal is proper under one of the grounds. The court stated:

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[64] People v. Milligan, 28 Ill. 2d 203, 204, 190 N.E.2d 753, 754 (1963); People v. Jennings, *supra* note 60, at 26-27, 102 N.E.2d at 827.

[65] People v. Milligan, *supra* note 64, at 205, 190 N.E.2d at 755 (failure to raise affirmative defense of insanity at trial); People v. Allen, *supra* note 52 (claim of denial of speedy trial not raised at trial); People v. Adams, *supra* note 17, at 457-58, 123 N.E.2d at 330 (failed to place objection of jury before trial court); People v. Clark, 405 Ill. 483, 486, 91 N.E.2d 409, 411 (1950) (waiver of right to copy of indictment and right to jury trial).

[66] People v. Hamby, 32 Ill. 2d 291, 294, 205 N.E.2d 456, 458 (1965); Ciucci v. People, *supra* note 57, at 85, 171 N.E.2d at 36-37; People v. Johnson, 15 Ill. 2d 244, 254, 154 N.E.2d 274, 280 (1958); People v. Kirkrand, 14 Ill. 2d 86, 89, 150 N.E.2d 788, 789 (1958); People v. Dolgin, 6 Ill. 2d 109, 111, 126 N.E.2d 681, 682 (1955).

> Whether a decision on a writ of error be *res judicata* or whether the defendant be considered to have waived any claims he could have made is immaterial, because it is clear that, having once obtained a review by a writ of error on a bill of exceptions, a defendant cannot thereafter assert any claims which he could have made on that writ of error.[67]

While in a particular case the State's attorney may present facts which on their face should bar the petitioner's action because of waiver, the courts have held that under some circumstances extrinsic facts may compel an exception to the usual application of the doctrine of waiver.[68] The reason for an exception to the usual application of waiver in this situation has been stated as follows:

> We consider the waiver principle a salutary one, conducive to the effective enforcement of the rules which society has established for its protection, but we have not hesitated to relax its application where fundamental fairness so requires.[69]

A third situation in which the doctrine of waiver has been found is where the petitioner has previously filed a petition for relief under the post-conviction statute; in that situation any constitutional claims which were not asserted are waived.[70] While the statute requires

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[67] Ciucci v. People, *supra* note 57, at 85, 171 N.E.2d at 36-37.

[68] In People v. Hamby, *supra* note 66, the petitioner received a review of his conviction for armed robbery even though he moved the court to refuse review. Petitioner's appointed counsel alleged grounds for reversal which the petitioner considered to be without merit. As counsel would not allege on appeal the grounds which petitioner wanted, petitioner requested that the Illinois Supreme Court strike his appointed counsel's abstract and briefs from the file and to appoint other counsel for him. The court overruled the motion, and then proceeded to find that the grounds advanced by appointed counsel were without merit. Petitioner next proceeded to file a petition under the post-conviction statute in which he alleged alternate grounds from those asserted on the previous appeal. The post-conviction court dismissed the petition because of the failure to raise the grounds on the previous appeal. The petitioner appealed once more, and the Illinois Supreme Court reversed the lower court's finding because it could not fairly be said that petitioner waived the issues.

See also People v. Kirkrand, *supra* note 66, in which petitioner alleged that his indigency prevented him from obtaining a transcript of the testimony which was necessary in order to raise certain issues. The court held that only those issues that could have been raised on the common law record are waived. The usefulness of this particular defense to waiver has been diminished since Griffin v. Illinois, 351 U.S. 12 (1956), and the enactment of Ill. Ann. Stat. ch. 110, § 101.65-1 (Smith-Hurd 1956) (provision for free transcripts for indigent defendants).

[69] People v. Hamby, *supra* note 66, at 294, 205 N.E.2d at 458.

[70] People v. Chapman, — Ill. 2d —, 211 N.E.2d 712, 713 (1965); People v. Orr, 10 Ill. 2d 95, 100, 139 N.E.2d 212, 215 (1957) (dictum); see also People v. Lewis, 2 Ill. 2d 328, 331, 118 N.E.2d 259, 261 (1954).

the doctrine of waiver to be applied in this situation,[71] there is also a statutory policy that a petitioner who seeks to take advantage of the post-conviction remedy must set forth in his petition for relief all the constitutional claims which he feels have been denied.[72] It is arguable that waiver would not be applied to those claims unknown to the petitioner because of inculpable ignorance at the time but no cases supporting this proposition have been found.

While any one of the foregoing factual situations presents an instance in which the doctrine of waiver could be successfully asserted, a determination that the issues have been waived at the state court level does not prevent a petitioner from raising the issues at the federal level.[73] While the petitioner may assert these issues in a federal court proceeding, the state is still allowed the opportunity to establish the fact of waiver.[74] Even if the state is successful in establishing the fact that the petitioner has waived the issues at the state court level, this does not automatically bar relief in a federal habeas corpus proceeding.[75] "Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas corpus, for waiver affecting federal rights is a federal question . . . ."[76]

Henry v. Mississippi[77] seems to provide an exception to the general rule that the federal courts may independently determine the question of waiver. The court said that:

> If either reason [for not objecting to the introduction of testimony] motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here.[78]

This last statement reinforces the Illinois Supreme Court's requirement that waiver may be found only where the petitioner was represented by counsel and where he had an opportunity to assert his claims.

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[71] Ill. Ann. Stat. ch. 38, § 122-3 (Smith-Hurd 1964) provides: "Any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived."

[72] People v. Lewis, *supra* note 70.

[73] Fay v. Noia, 372 U.S. 391, 438-39 (1963).

[74] Henry v. Mississippi, 379 U.S. 443, 452 (1965).

[75] Fay v. Noia, 372 U.S. 391, 439 (1963).

[76] *Ibid.* For an analysis of federal waiver doctrines, see Comment, 27 Ohio St. L.J. 321, 322 (1966).

[77] 379 U.S. 443 (1965).

[78] Henry v. Mississippi, *supra* note 77, at 451.

B. *Res Judicata*

As in the case of waiver, the doctrine of res judicata may be effectively asserted by the State's attorney to prevent further adjudication of the post-conviction petition. Res judicata under both the Ohio[79] and the Illinois[80] laws applies to not only those issues which were adjudicated but also to those issues which might have been adjudicated in the previous proceeding. The Illinois Supreme Court has made it clear that the remedy provided by the post-conviction statute may not prevail where the issues are res judicata when it said: "The remedy provided for under the act cannot be employed to obtain another hearing upon claims of denial of constitutional rights as to which a full and final hearing on the merits has already been had."[81]

While the doctrine of res judicata must be accorded due consideration within the post-conviction remedy, its use cannot be an automatic barrier to an investigation of the alleged denials of constitutional rights if the purpose of the statute is to be served.[82] The court has ruled that the doctrine of res judicata must not be mechanically applied in a post-conviction case except where the identical issues which are raised in the post-conviction petition have received a full and final hearing on the merits by the Illinois Supreme Court. The court has stated:

> [I]t is clear that *res judicata* cannot be mechanically applied to foreclose an inquiry which probes beneath the mere fact of adjudication to determine whether or not, in process of adjudication, there has been any infringement of the constitutional rights of the petitioner. Such an inquiry must be made even though it involves a collateral attack upon a judgment which the court has jurisdiction and authority to enter. Of course . . . constitutional issues which have been determined on the merits by this court are not available upon a post-conviction hearing.[83]

Any proceeding, which is free from constitutional defect itself and in which the alleged claims have been adjudicated against the petitioner, may serve as the basis for the assertion of the doctrine of res judicata in a proceeding under the post-conviction statute. A review

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[79] Pollock v. Cohen, 32 Ohio St. 514, 519-20 (1877).

[80] People v. Thompson, 392 Ill. 589, 591, 65 N.E.2d 362, 363 (1946).

[81] People v. Dale, 406 Ill. 238, 244, 92 N.E.2d 761, 765 (1950).

[82] People v. Wakat, 415 Ill. 610, 617, 114 N.E.2d 706, 710 (1953).

[83] People v. Jennings, *supra* note 60, at 25, 102 N.E.2d at 826. See also People v. Evans, *supra* note 41, at 212, 122 N.E.2d at 730; People v. Reeves, *supra* note 36, at 559, 107 N.E.2d at 864; People v. Manning, 412 Ill. 519, 522, 107 N.E.2d 856, 857 (1952).

or denial of a petition for writ of error by the Illinois Supreme Court is res judicata as to all assigned errors.[84] Also the allegations contained in an earlier petition for habeas corpus will be res judicata on a later post-conviction petition unless newly discovered evidence is presented.[85] Lastly, it would also seem that a previous denial on the merits of relief by means of a writ of error coram nobis would be res judicata on the same issues in a post-conviction petition.[86]

In many cases, the original trial court has ruled on the very issues which are later presented to the post-conviction court. For example, petitioner may have objected to the introduction into evidence of a confession on the grounds that it was coerced. Suppose further that the trial judge heard argument on the issue and determined that the confession was not coerced. Should the trial judge's determination that the confession was not coerced be held res judicata on that issue in the post-conviction court? The appellate courts have said that "due weight should be accorded that determination"[87] where the issues have been fairly asserted and litigated. But surely the due weight requirement does not mean a complete foreclosure on the post-conviction court to determine the merits because to do so would be to reintroduce the mechanical application of res judicata which the court has condemned.[88] Yet the opposite result would attain if the previous determination had been made by a post-conviction court and petitioner seeks to raise the issue of a coerced confession in a second post-conviction court. In that case, the application of res judicata would be justified.[89]

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[84] Ciucci v. People, *supra* note 57, at 85, 171 N.E.2d at 36; People v. Johnson, *supra* note 66, at 254-55, 154 N.E.2d at 280; People v. Dolgin, *supra* note 66, at 111, 126 N.E.2d at 682; People v. Davis, 415 Ill. 234, 236, 112 N.E.2d 484, 485 (1953).

[85] People v. Evans, *supra* note 41, at 212, 122 N.E.2d at 730 (dictum); People v. Pring, 414 Ill. 63, 65, 110 N.E.2d 214, 215 (1953).

[86] People v. Manning, *supra* note 83, at 521-22, 107 N.E.2d at 857 (dictum).

[87] People v. Jennings, *supra* note 60, at 25, 102 N.E.2d at 826.

[88] For illustrative cases in which petitioner received a full post-conviction hearing on the merits of the issue alleged in the post-conviction petition, even though the original trial court decided against the petitioner on the exact issues, see People v. Byrd, 21 Ill. 2d 114, 171 N.E.2d 782 (1961) (issue of coerced confession); Davies v. People, *supra* note 39 (issue of coerced confession); Reck v. People, *supra* note 48 (issue of coercion presented to two judges and one jury); People v. La Frana, 4 Ill. 2d 261, 122 N.E.2d 583 (1954) (indigence prevented review of trial court); People v. Wakat, *supra* note 82 (newly discovered evidence).

[89] People v. Dampher, 28 Ill. 2d 136, 190 N.E.2d at 705 (1963); People v. Byrd, *supra* note 88, at 115, 171 N.E.2d at 783.

IV. Procedure of Final Disposition

Once the post-conviction court determines that the petitioner may be entitled to relief and that waiver and res judicata do not bar further proceedings, the court affords the petitioner a hearing on the merits. The procedures which are followed in the post-conviction hearing and in further appeal are the concern of this section. In Ohio and Illinois, the procedure used in adjudicating the constitutional issues raised by the petition is an overlapping of statutory guidelines and judicial discretion. Both the Ohio and Illinois statutes[90] are scant in their specificity of the procedures to be followed by the post-conviction court. Each statute mentions that the petitioner's presence may be ordered, that evidence may be introduced and that judgment and further orders concerning the petitioner must be made.[91] Beside this listing of procedures which may be followed, the statutes are without additional guidance. Thus it is the post-conviction court, itself, that is given the responsibility for overseeing the procedure during a hearing. The trial judge is given discretion as to whether the petitioner will be present during the hearing, the kinds of evidence and the manner in which it is to be presented, and the final disposition of the petitioner and his petition.[92] The trial judge's discretion over procedural matters is reviewable upon appeal,[93] but it is the position of the Illinois Supreme Court to reverse only if the exercise of his discretion was clearly erroneous.[94]

A. *Presence of Petitioner*

Under the Ohio and Illinois statutes,[95] it is the hearing judge who must require that the petitioner be brought before the court so that he may be present during the hearing. The petitioner is not vested with an inherent right to be present during the hearing.[96] Even

90 Ill. Ann. Stat. ch. 38, art. 122 (Smith-Hurd 1964); Ohio Rev. Code Ann. §§ 2953.21-.24 (Page Supp. 1965).

91 Ill. Ann. Stat. ch. 38, § 122-6 (Smith-Hurd 1964); Ohio Rev. Code Ann. § 2953.22 (Page Supp. 1965).

92 Jenner, "The Illinois Post-Conviction Hearing Act," 9 F.R.D. 347, 361 (1950).

93 Ill. Ann. Stat. ch. 38, § 122-7 (Smith-Hurd 1964); Ohio Rev. Code Ann. § 2953.23 (Page Supp. 1965).

94 See *infra* note 135.

95 Ill. Ann. Stat. ch. 38, § 122-6 (Smith-Hurd 1964) provides: "In its discretion the court may order the petitioner brought before the court for the hearing." Ohio Rev. Code Ann. § 2953.22 (Page Supp. 1965) provides: "A court may entertain and determine a petition filed pursuant to section 2953.21 of the Revised Code without requiring the production of the prisoner, whether or not a hearing is held."

96 People v. Cummins, 414 Ill. 308, 310, 111 N.E.2d 307, 309 (1953).

his petition for a writ of *habeas corpus ad testificandum* depends on the discretion of the post-conviction trial judge for its success.[97]

The policy behind this reservation is that the petitioner should only be transported from the state penitentiary to the county in which he was convicted when his presence is necessary.[98] The policy disfavors free trips[99] and encourages that utility be promoted by the petitioner's presence in court. It is the duty of the trial judge to balance the interests involved in deciding if there is sufficient utility to merit the expense of transporting the petitioner. Because the petitioner's interests are represented by counsel during the hearing,[100] the court will only order the petitioner's appearance if his testimony cannot be presented to the court satisfactorily by another means.[101] The trial judge's discretion in this matter is conclusive on appeal so long as it is not arbitrary.[102]

B. *Evidence During the Hearing*

The manner in which the petitioner may present evidence during the hearing to substantiate his allegations is again dependent on the discretion of the hearing judge. A simple listing of the types of evidence which may be used during the hearing is the extent of statutory guidance given to the court.[103] It is the hearing judge who must deter-

97 People v. Adams, 4 Ill. 2d 453, 458, 123 N.E.2d 327, 330 (1954).

98 In People v. Cummins, *supra* note 96, petitioner on appeal contended that the post-conviction court erred in not permitting him to appear at the hearing. The court said that there was no error because "the record is barren of any request or of any showing from which the court could determine that his presence was either a procedural or substantive necessity."

99 Jenner, *supra* note 92, at 361 states: "It was believed that prisoners should not be able to secure a free trip from the penitentiary merely by verifying a petition which is good on its face." In Ohio the policy would seem even more attractive because verification is more simply accomplished in Ohio than in Illinois.

100 If the petitioner cannot afford an attorney to represent him at the post-conviction proceedings, provisions are made in both statutes to appoint counsel: Ill. Ann. Stat. ch. 38, § 122-4 (Smith-Hurd 1964); Ohio Rev. Code Ann. § 2953.24 (Page Supp. 1965).

101 People v. Cummins, *supra* note 96; People v. Mitchell, 411 Ill. 407, 408, 104 N.E.2d 285 (1952). In People v. Cummins, *supra*, petitioner alleged on appeal that it was unfair to receive the State's attorney's testimony at the post-conviction hearing during which the petitioner was not permitted to appear. The court said that petitioner's assertion overlooked the fact that the petitioner was represented by counsel who thoroughly cross-examined the State's attorney, thus providing an opportunity for the court to determine his credibility.

102 People v. Cummins, *supra* note 96.

103 Ill. Ann. Stat. ch. 38, § 122-6 (Smith-Hurd 1964) provides: "The court may receive proof by affidavits, depositions, oral testimony, or other evidence." See also Ohio Rev. Code Ann. § 2953.22 (Page Supp. 1965).

mine what means of presenting evidence best promotes justice and fairness in a given context.[104]

The extent to which the hearing judge has been permitted to exercise his discretion in evidentiary matters can be demonstrated by the variety of means which have been sustained on appeal. For example, the court may try the controverted issues of fact upon affidavits in lieu of testimony during the hearing.[105] The basis of the decision affirming the use of this singular approach is that the affidavits filed under the Illinois statute are expected to state and substantiate the petitioner's claims as strongly as possible.[106] The hearing judge may also receive evidence not heard at the original trial,[107] as well as determine the credibility of the evidence which was presented at the trial.[108] Lastly, while it is proper for the hearing judge to read the transcript of the evidence presented at the original trial, he is not required to do so; and his refusal will not be prejudicial error.[109]

C. *Burden of Proof and Judgment*

During the post-conviction hearing it is the petitioner who has the burden of proving the truth of the allegations contained in his petition.[110] The petitioner has the burden because the statute has directed that the procedural aspects be treated as if the proceeding were a civil action.[111] To sustain his burden, the petitioner's proof

[104] In People v. Wakat, *supra* note 82, at 616-17, 114 N.E.2d at 709, the court stated: "The hearing on a post-conviction petition is a new and independent investigation, with the hearing court authorized and required to use any proper procedure necessary and appropriate in order to discharge its duty of determining the existence or nonexistence of facts which would constitute a denial of a claimed constitutional right."

[105] People v. Mitchell, *supra* note 101; People v. Dale, *supra* note 81, at 248, 92 N.E.2d at 766-67.

[106] People v. Cummins, *supra* note 96, at 311, 111 N.E.2d at 309.

[107] People v. Wakat, *supra* note 82, at 614-15, 114 N.E.2d at 708. The court not only said that the post-conviction judges have the power to receive evidence not heard at the original trial, but also they have an obligation to exercise the power.

[108] People v. Alden, 15 Ill. 2d 498, 503, 155 N.E.2d 617, 620 (1959).

[109] People v. Thomas, 20 Ill. 2d 603, 608, 170 N.E.2d 543, 545-46 (1960); People v. Hall, 413 Ill. 615, 626, 110 N.E.2d 249, 255 (1953). In People v. Hall, *supra*, the court ended its opinion by asking: "Is not this provision [Ill. Ann. Stat. ch. 38, § 122-6 (Smith-Hurd 1964)] broad enough to permit petitioner to show, not only anything which might appear in the transcript, but anything that might have occurred before, during or after his trial?" It is arguable that this inquiry can be used to support a finding that the petitioner should be able to impeach the evidence contained in the transcript. It follows that if the provision allows petitioner to show what is in the transcript and to show events not in the record, then where the transcript and other events are inconsistent with each other, petitioner should be able to demonstrate this inconsistency to the court.

[110] People v. Thomas, *supra* note 109, at 607, 170 N.E.2d at 545; People v. Alden, *supra* note 108.

[111] People v. Bernatowicz, 413 Ill. 181, 184, 108 N.E.2d 479, 481 (1952).

must clearly establish a deprivation,[112] or at a minimum it must make a substantial showing of such a deprivation.[113] It is necessary to sustain this burden before the State's attorney is required to present evidence.[114] In cases in which petitioner's proof is successful, the burden of proof shifts to the State which must then defend with its evidence.[115]

After the evidence has been presented for both sides, the post-conviction court must thereafter render judgment. Both the Ohio and Illinois statutes contemplate that the petition will be disposed of at the trial level.[116] To dispose fully of the petition the court must decide if the petitioner was successful and what further orders concerning the petitioner should be made. If the petitioner's claims have not been sustained, the petition will be dismissed and the petitioner will be recommitted with or without resentencing. If the petitioner is successful, the court's usual disposition will be to set aside the conviction and order a new trial.[117] In either event the court is given freedom in shaping the final orders concerning the petitioner.[118]

D. *Appeal*

The post-conviction hearing is an original proceeding,[119] which is commenced at the trial level, and as such, review must necessarily

[112] See People v. Morris, 3 Ill. 2d 437, 449, 121 N.E.2d 810, 817 (1954).

[113] See People v. Reeves, 412 Ill. 555, 560, 107 N.E.2d 861, 864 (1952), in which the court said: "However we do not intend hereby to lessen the duty of petitioners under the act to make a substantial showing of a violation of constitutional rights, for the allegation of a mere conclusion to that effect under oath will not suffice."

[114] People v. Hall, *supra* note 109, at 621, 110 N.E.2d at 252-53.

[115] See, *e.g.*, People v. La Frana, *supra* note 88, in which petitioner clearly established during the post-conviction hearing that he received injuries while in police custody. The State's attorney merely denied the charge, but the court in reversing petitioner's conviction for murder said: "Under such circumstances the burden of establishing that the injuries were not administered in order to obtain the confession, can be met only by clear and convincing testimony as to the manner of their occurrence." People v. La Frana, *supra* at 267, 122 N.E.2d at 586.

[116] Ill. Ann. Stat. ch. 38, § 122-6 (Smith-Hurd 1964) provides: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, bail or discharge as may be necessary and proper." Ohio Rev. Code Ann. § 2953.21 (Page Supp. 1965) provides: "If the court finds . . . [for the petitioner] it shall vacate and set aside the judgment, and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate."

[117] People v. Jennings, 411 Ill. 21, 27, 102 N.E.2d 824, 827 (1952).

[118] Ill. Ann. Stat. ch. 38, § 122-6 (Smith-Hurd 1964); Ohio Rev. Code Ann. § 2953.21 (Page Supp. 1965).

[119] In People v. Wakat, *supra* note 82, at 617-18, 114 N.E.2d at 710, the court described the post-conviction proceeding as follows: "[O]ur decisions have made it clear that a post-conviction proceeding is not an appeal or a limited review by an intermediate

be made available to the petitioner in order to insure completeness of the remedy. In accordance with this aim, provision is made in both the Illinois and Ohio statutes for review of the lower court's judgment.[120] In Illinois appeals are taken to the Illinois Supreme Court as an appeal is taken in "civil cases."[121] The Illinois Supreme Court has interpreted the statutory provision of appeal in such a way so as to permit both the petitioner and the State to appeal as a matter of right.[122] The State's right to appeal, reasons the court, is based upon the same considerations which permitted the State to appeal in the similar Illinois remedy of coram nobis.[123]

While the court has given a liberal construction to the words "civil cases" so that either party may seek review, the court has placed a rather narrow and carefully defined interpretation on the statutory words, "final judgment entered upon such petition," which are found in the same section.[124] This narrow interpretation has limited the scope of the court's review to only certain allegations in the petition upon which the hearing court's judgment was based.[125] The test as to which allegations will be reviewed is found in the court's narrow interpretation of the statutory words, "such petition."[126] The court held in *People v. Hartman*,[127] that the words, "such petition," refer to a petition "in which specific actions, constituting denial of constitutional right, are alleged to have resulted in petitioner's imprisonment."[128] Thus if a petition contains allegations as prescribed by the court in its interpretation of "such petition," these allegations are reviewable by the court. The practical result of this definitional scope of review is that a court will not review a judgment based on a petition which fails to show a constitutional denial, a petition which does not

court, but is an original proceeding in which a petitioner who complies with the requirements of the statute is entitled to a full judicial hearing upon the merits of the constitutional claims asserted."

120 Ill. Ann. Stat. ch. 38, § 122-7 (Smith-Hurd 1964) provides: "Any final judgment entered upon such petition may be reviewed by the Supreme Court as an appeal in civil cases." Ohio Rev. Code Ann. § 2953.23 (Page Supp. 1965) provides: "An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code shall be deemed a final judgment and may be appealed pursuant to Chapter 2505 of the Revised Code."

121 Ill. Ann. Stat. ch. 38, § 122-7 (Smith-Hurd 1964).

122 See McKeag v. People, 7 Ill. 2d 586, 587, 131 N.E.2d 517 (1956); People v. Dolgin, 6 Ill. 2d 109, 126 N.E.2d 681 (1955); People v. Hyrciuk, 5 Ill. 2d 176, 177, 125 N.E.2d 61, 62 (1955); People v. Joyce, 1 Ill. 2d 225, 226, 115 N.E.2d 262, 263 (1953).

123 People v. Joyce, *supra* note 122, at 227, 115 N.E.2d at 263.

124 Ill. Ann. Stat. ch. 38, § 122-7 (Smith-Hurd 1964).

125 People v. Hartman, 408 Ill. 133, 96 N.E.2d 449 (1951).

126 Ill. Ann. Stat. ch. 38, 122-7 (Smith-Hurd 1964).

127 *Supra* note 125.

128 People v. Hartman, *supra* note 125, at 138, 96 N.E.2d at 451.

clearly set forth the specific acts of denial,[129] nor a petition containing a denial which was not presented to the lower court.[130] Hence, the only petition which the court will review is a petition which clearly stated a constitutional denial which was raised at the trial level and made a part of the judgment.

Once the court decides that the petition is reviewable, it next proceeds to examine the evidence presented during the post-conviction hearing in support of the allegations. Its purpose for this examination is to determine if the judgment of the lower court was a fair disposition of the petition when considered in the light of the evidence presented.[131] In making this determination of fairness, the court simultaneously complies with both the statutory right of review and the petitioner's constitutional right to a complete remedy at the state court level.[132]

In reviewing the petition the court relies on the findings of fact made by the post-conviction court because it had an opportunity to see and hear the witnesses.[133] This reliance on the lower court's findings of fact, while practical and even arguably necessary, results in the Illinois Supreme Court's unwillingness to substitute its judgment for that of the lower court.[134] In fact the court will only substitute its judgment when it finds that the lower court's determination was manifestly erroneous.[135]

The court's use of the manifestly erroneous test has further limited the scope of its review by defining the seriousness of the errors that would serve as a basis for reversal. The result of this further limitation is that the effectiveness of the remedy provided by the statute is necessarily and directly reduced. The frustration of the remedy occurs in an area between two polar bases for the hearing court's determination: the manifestly erroneous basis and the close-question basis wherein the issue of fact would be submitted to a jury if it were a different proceeding. That area would include a situation

129 People v. Vitale, 3 Ill. 2d 99, 104, 119 N.E.2d 784, 787 (1954).

130 People v. Nischt, 23 Ill. 2d 284, 288, 178 N.E.2d 378, 381 (1961); People v. Reeves, *supra* note 113, at 559, 107 N.E.2d at 863.

131 People v. Jefferson, 24 Ill. 2d 398, 402, 182 N.E.2d 1, 2 (1962); People v. Kirkwood, 17 Ill. 2d 23, 33, 160 N.E.2d 766, 772 (1959).

132 Jennings v. Illinois, 342 U.S. 104 (1951).

133 See Jackson v. People, 16 Ill. 2d 526, 529, 158 N.E.2d 589, 590 (1959); People v. Alden, *supra* note 108, at 503, 155 N.E.2d at 620; Davies v. People, 10 Ill. 2d 11, 15, 139 N.E.2d 216, 218 (1956); McKeag v. People, *supra* note 122, at 588, 131 N.E.2d at 518.

134 People v. Cummins, *supra* note 96, at 312, 111 N.E.2d at 310.

135 People v. Alden, *supra* note 108, at 503, 155 N.E.2d at 620; Davies v. People, *supra* note 133, Reck v. People, 7 Ill. 2d 261, 265, 130 N.E.2d 200, 202 (1955).

in which the post-conviction petition was disposed of by the original trial judge whose earlier decision of the guilt of the petitioner or the exact issue at the hearing was, in his opinion, the proper decision. Evidence presented at the hearing would then incur an additional burden of persuasion because of the judge's belief in his earlier decision. Evidence, arguably sufficient before another hearing judge, might fail before the original judge; on appeal the court's use of the manifestly erroneous test would prevent reversal. Thus it would seem that a less extreme test might better serve the objectives of the statute and insure the fair and complete hearing contemplated by it. Effectiveness would increase if the reviewing court would substitute its judgment where the appeal presented a substantial doubt as to the fairness of the lower court's findings. The substantial doubt test would assist the court in carrying out its purpose of review,[136] because the lower court's disposition of the petition can also be unfair when the correctness of the lower court's findings are in substantial doubt.

CONCLUSION

The purpose of this comment has been to demonstrate the problems raised under the Illinois post-conviction remedy statute and their resolution by the Illinois courts. Given the relative similarity of language and objectives of the new Ohio act, it would seem to follow that the Ohio lawyer and judge will experience some comparable, if not identical, difficulties in the interpretation and application of the act. Hence, it should be useful to examine the approaches used by states, such as Illinois, under their post-conviction remedy acts in order to acquire possible standards and guidelines consistent with United States Supreme Court mandates for adequate post-conviction relief. It is hoped that the analysis of the Illinois act will suggest not only a procedural approach to the new Ohio act but a substantive inquiry into the competing claims of adequate post-conviction relief and finality in the criminal process.

Hugh James Stevenson

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136 *Supra* note 131.